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Public Prosecutor v Bonadventure Chinedu Okoro

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(LB)-284–10 OF 2015(NGA)
TENGKU MAIMUN, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
26 OCTOBER 2016

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Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Accused charged with offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 — Trial court found accused's defence of innocent carrier proven — Accused acquitted and discharged — Whether learned trial judge erred in his decision that accused had proven defence of innocent carrier — Whether learned trial judge erred in his decision that accused's testimony in court consistent with accused's cautioned statement — Dangerous Drugs Act 1952 s 39B(1)(a)

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The accused was charged with the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. The prosecution's case was that, PW4 who was on surveillance duty at the Kuala Lumpur International Airport had found eight packages in the accused's luggage bag ('P40') in which four packages contained macaroni while each of the other four packages contained one transparent plastic bag with crystalline substances respectively besides macaroni. The accused's defence was that he was an innocent carrier. He argued that one Ejike handed over P40 to him and the eight plastic packages containing macaroni were not visible to the naked eyes as to what were inside them. The learned trial judge held that the defence of the accused had successfully rebutted the statutory presumption of trafficking on a balance of probabilities and had cast a reasonable doubt on the prosecution's case. The learned trial judge therefore acquitted and discharged the accused on the charge as proffered. Aggrieved by the decision, the prosecution filed the present appeal. The grounds of appeal raised by the prosecution were: (a) that the learned trial judge erred when His Lordship decided that the accused had successfully proven the defence of an innocent carrier; and (b) that the learned trial judge erred when His Lordship decided that the accused's testimony in court was consistent with the accused's cautioned statement ('D68').

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Held, allowing the appeal, setting aside the order of the High Court, convicting the accused under the original charge and sentencing the accused to death:

(1) The learned trial judge had misdirected himself on the issue of knowledge and the defence of innocent carrier put up by the accused. The learned

trial judge erred in relying only on the appearance and transparency of the packages to negate inference of knowledge on the part of the accused. The defence of innocent carrier could not be believed and had not cast any reasonable doubt on the prosecution's case just because the packages were not transparent. Based on the factual matrix of the case, the accused had every reason to suspect when given the eight packages of macaroni where four of them were of different weight but he did not examine them even when he had the chance and opportunity to do so. The accused had himself to be blamed for his folly for not examining the eight packages (see paras 19, 23 & 25–26).

(2) There were too many material and important information as well as facts which were stated in the accused's oral testimony in court but were not in D68 which rendered the differences as material contradictions. The name Udo and that there was a call to the accused's handphone by somebody who claimed to be Ejike's brother, were afterthought defence. These had never ever been raised in the prosecution's case or in D68. The learned trial judge's finding that the accused's oral testimony was consistent with his cautioned statement was based on the wrong appreciation of the evidence (see paras 28 & 31–32).

[Bahasa Malaysia summary

Tertuduh dituduh dengan kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Kes pihak pendakwaan adalah bahawa, PW4 yang menjalankan tugas pengawasan di Lapangan Terbang Antarabangsa Kuala Lumpur telah mendapati lapan paket di dalam beg tertuduh ('P40') di mana empat paket mengandungi makaroni sementara setiap empat paket yang lain mengandungi satu beg plastik lutsinar dengan masing-masing mengandungi bahan kristal selain daripada makaroni. Pembelaan tertuduh adalah bahawa dia adalah pembawa tidak salah. Dia berhujah bahawa seorang yang bernama Ejike menyerahkan kepadanya P40 dan lapan paket plastik yang mengandungi makaroni tidak dapat dilihat apa yang terletak di dalamnya. Hakim yang bijaksana memutuskan bahawa pembelaan tertuduh telah berjaya mematahkan anggapan statutori pengedaran atas imbangan kebarangkalian dan telah melemparkan keraguan munasabah ke atas kes pihak pendakwaan. Hakim perbicaraan yang bijaksana oleh itu membebaskan dan melepaskan tertuduh atas tuduhan yang dikenakan. Tidak puas hati dengan keputusan tersebut, pihak pendakwaan memfailkan rayuan ini. Alasan rayuan yang dibangkitkan oleh pihak pendakwaan adalah: (a) bahawa hakim perbicaraan yang bijaksana tersilap apabila Yang Arif memutuskan bahawa tertuduh telah berjaya membuktikan pembelaan pembawa tidak salah; dan (b) bahawa hakim perbicaraan yang bijaksana tersilap apabila Yang Arif memutuskan bahawa keterangan tertuduh di dalam mahkamah adalah konsisten dengan pernyataan beramaran tertuduh ('D68').

Diputuskan, membenarkan rayuan, mengetepikan perintah Mahkamah Tinggi, menyabitkan tertuduh di bawah tuduhan asal dan menjatuhkan hukuman mati ke atas tertuduh:

(1) Hakim perbicaraan yang bijaksana telah salah arah dirinya atas isu pengetahuan dan pembelaan pembawa yang tak bersalah yang dikemukakan oleh tertuduh. Hakim perbicaraan yang bijaksana tersilap dalam bergantung hanya ke atas penampilan dan kelutsinaran paket-paket untuk menyangkal inferens pengetahuan ke atas pihak tertuduh. Pembelaan pembawa tidak salah tidak boleh dipercayai dan tidak melemparkan apa-apa keraguan munasabah ke atas kes pihak pendakwaan hanya kerana paket-paket tersebut tidak jelas. Berdasarkan matriks fakta kes, tertuduh mempunyai setiap alasan untuk mengesyaki apabila diberi lapan paket makaroni di mana empat daripadanya beratnya adalah berbeza tetapi dia tidak memeriksanya walaupun dia mempunyai peluang untuk melakukannya. Tertuduh sendiri boleh dipersalahkan ke atas kebodohannya kerana tidak memeriksa kelapan-lapan paket tersebut (lihat perenggan 19, 23 & 25–26).

(2) Terdapat banyak maklumat yang material dan penting dan juga fakta yang mana dinyatakan di dalam keterangan lisan tertuduh di dalam mahkamah tetapi tidak di dalam D68 yang mana menyebabkan perbezaan sebagai percanggahan material. Nama Udo dan bahawa terdapat panggilan ke telefon bimbit tertuduh oleh seorang yang mendakwa abang kepada Ejike, adalah pembelaan sesuatu yang difikirkan kemudian. Ini tidak pernah dibangkitkan di dalam kes pihak pendakwaan atau di dalam D68. Dapatan hakim perbicaraan yang bijaksana bahawa keterangan lisan tertuduh adalah konsisten dengan pernyataan beramarannya berdasarkan atas penilaian keterangan yang salah (lihat perenggan 28 & 31–32).]

Notes

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 976–980.

Cases referred to

Baharudeen Mohamed Yusoff Ghaney v PP [2013] 2 MLJ 425, CA (refd)
Munuswamy Sundar Raj v PP [2015] 6 MLJ 214; [2016] 1 CLJ 357, FC (refd)
Paul Anayo Madubugwu v PP [2015] MLJU 2143; [2015] 1 LNS 431, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da)(xvi), 39B(1)(a), (2), First Schedule
Evidence Act 1950 s 57, 57(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (1)(i), (1)(j), (1)(k), (1)(l), (1)(m), (1)(n), (1)(o)

Appeal from: Criminal Trial No 45A-86–09 of 2014 (High Court, Shah Alam)

Dhiya Syazwani Izyan bt Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Rao Jayananda (Rao & Kamal) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

[1] The respondent, a Nigerian national was charged with an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') in the High Court at Shah Alam. The charge was as follows:

> That you on 23rd September 2013 at about 3.00 pm at the Luggage Collection area at International Arrival Hall, Level 3, MTB, Kuala Lumpur International Airport, in the district of Sepang, in the state of Selangor, did traffic in a dangerous drugs, to wit, 837.9 grammes of Methamphetamine and thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act.

[2] At the end of the trial, the learned trial judge had acquitted and discharged the respondent. Hence the appeal before us.

[3] We heard the prosecution appeal on 22 September 2016 whereby we allowed the appeal. We now give our reasons.

THE PROSECUTION'S CASE

[4] On 23 September 2013 at around 3pm, Sgt Nor Reshiam bin Kasim ('PW4') was on surveillance duty at the arrival hall, Level 3, MTB, KLIA when he stopped the respondent for inspection. PW4 then directed the respondent to put his luggage bag brand 'Adidas' (P40) into the scanning machine but PW4 found no suspicious image.

[5] PW4 further instructed the respondent to bring his luggage bag ('P40') to the Narcotics Office at the same level for detailed inspection. While inside the room, PW4 had conducted a body search of the respondent but nothing incriminating was discovered. On inspection of the respondent's black sling beg, PW4 discovered clothes and no incriminating item was found.

[6] When the luggage bag, P40, was opened and inspected, PW4 found eight packages of macaroni (P50(1–8)) placed on top of the clothes inside the bag. PW4 took out all the packages and examined each one of them. PW4 became suspicious when he discovered that the weight of each package was different. PW4 opened each and every package. As a result, PW4 found that

four of the packages contained macaroni while each of the other four packages contained one transparent plastic bag with crystalline substances respectively (P49(1–4)) besides macaroni.

[7] The respondent and all the exhibits seized by PW4 were handed over to Insp Eddy Amin bin Hussin Ala (PW6) for further action. All the exhibits were later handed over to Dr Saravanan Kumar a/l Jayaram ('PW5'), the chemist for analysis.

[8] Upon analysis, PW5 confirmed that the crystalline substance recovered from inside the four plastic bags received by him contained 837.9g of methamphetamine, a dangerous drug under the First Schedule of the Act. These being the subject matter of the charge against the respondent.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[9] At the close of the prosecution's case the learned trial judge found that the respondent had the physical and mental element, either direct or presumed, as to the existence of the impugned drugs inside the luggage bag (P40). The learned trial judge held that the respondent had mens rea possession of the impugned drugs. As to the element of trafficking, the learned trial judge had invoked the presumption under s 37(da)(xvi) of the Act.

[10] The learned trial judge was satisfied that the prosecution had successfully established a prima facie case against the respondent. The respondent was called to enter his defence.

THE DEFENCE

[11] The respondent chose to give evidence under oath. The defence version as summarised by the learned trial judge was as follows:

(a) the respondent came to Malaysia to survey motorcycle spare parts market and to buy motorcycle spare parts because he was involved in motorcycle spare parts business at his shop in Nkwo, Nigeria since year 2000;

(b) he had a friend whose name is Ejike Chukwuebuka ('Ejike') who told him that his elder brother named Udo Chukwuebuka ('Udo') was also involved in motorcycle business in Malaysia and could assist the respondent in surveying the motorcycle spare parts market in Malaysia;

(c) he was encouraged by Ejike to come to Malaysia to buy motorcycle spare parts as they could be obtained at cheaper price and that this could be done through Udo;

(d) he was a member of a motorcycle dealers association in Nigeria which is known as FUNMDA since year 2000, as supported by a member identity card (P54);

(e) on 21 September 2013 at around 7am, at the bus station at Nkwo, Nigeria, Ejike had handed over the bag (P40) to him. He did open the bag and saw some personal stuffs, such as, clothes and red coloured plastic packages printed with words 'Golden Penny Eliche' containing macaroni. Without any suspicion and upon trust towards a friend (Ejike), he brought the bag and boarded the bus to Lagos Airport; and

(f) that he was an innocent carrier since the eight plastic packages containing macaroni were not visible to the naked eyes as to what were inside them.

[12] The learned trial judge had re-evaluated the prosecution's evidence in the light of the defence case and held that the prosecution had failed to prove the charge against the respondent beyond a reasonable doubt. The learned trial judge held that the defence of the respondent had successfully rebutted the statutory presumption of trafficking on a balance of probabilities and had cast a reasonable doubt on the prosecution's case. The learned trial judge therefore acquitted and discharged the respondent on the charge as proffered.

THE APPEAL

[13] Before us, the learned deputy public prosecutor ('the learned deputy') canvassed only two grounds of appeal in her submissions, namely:

(a) that the learned trial judge erred when His Lordship decided that the respondent had successfully proven the defence of an innocent carrier; and

(b) that the learned trial judge erred when His Lordship decided that the respondent's testimony in court was consistent with the respondent's cautioned statement (D68).

[14] In respect of the first ground, the learned deputy submitted that the learned trial judge had fallen into an error when His Lordship came to the conclusion that the respondent had successfully proven the defence of an innocent carrier. This argument was premised on the proposition that the learned trial judge had misdirected himself when His Lordship decided that because the eight packages in question were not transparent for their contents to be visible, the defence of innocent carrier becomes probable.

[15] It was argued by learned deputy that the learned trial judge had misdirected himself on the issue of transparency of the packages when the

A evidence recorded and available before the learned trial judge showed that the contents of the eight packages were partially visible from its outside. Besides, the learned trial judge had wrongly blamed the learned DPP who handled the trial as misleading the court on this issue.

B **[16]** The learned deputy also submitted that the learned trial judge had merely alluded to the wrong finding that the packages were not transparent to negate the element of knowledge on the part of the respondent. The learned deputy argued that the learned trial judge had erred in law on the defence of innocent carrier. It is argued further that the defence of innocent carrier has not C been established by the respondent based on the factual matrix of the instant case. The learned deputy argued that the respondent was caught under the principle of willful blindness.

D **[17]** In respect of the second ground of appeal, the learned deputy submitted that the learned trial judge had fallen into another error when His Lordship decided that the oral testimony of the respondent was consistent with his cautioned statement (D68), therefore it should be believed. The learned deputy argued that the defence put forward by the respondent was one of E fabrication in order to raise a weak defence of innocent carrier. The learned deputy submitted that the defence of the respondent should not be believed and had not raised any reasonable doubt based on various reasons as stated by learned deputy before us which we will divulge in due course.

F **[18]** The learned deputy further submitted that the learned trial judge had failed to consider material contradictions between the respondent's oral testimony and his cautioned statement (D68). The failure of the learned trial judge to appreciate or wrongly appreciate the evidence in this case amounted to a misdirection for non direction which warrant appellate intervention.

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OUR DECISION

[19] The two grounds of appeal canvassed by the learned deputy before us centered on the adverse finding made by the learned trial judge on the element H of knowledge. The learned trial judge made a finding that the respondent had succeeded in rebutting the element of knowledge which in the final analysis, the learned trial judge held that the respondent was just an innocent carrier in this drugs peddling. We agreed with the learned deputy's complaint that the learned trial judge had misdirected himself on the issue of knowledge and the I defence of innocent carrier put up by the respondent.

[20] The defence of innocent carrier had been lucidly discussed by Suriyadi Halim Omar FCJ in *Munuswamy Sundar Raj v Public Prosecutor* [2015] 6 MLJ 214 at p 219–221; [2016] 1 CLJ 357 at pp 362–363 as follows:

[9] We were rather perturbed by the above remarks as that is not the correct proposition of law in drug trafficking cases. The defence of innocent carrier is a valid defence that could be alluded to by an accused person, and in this case the appellant. A plethora of cases sprinkles the legal journals in Malaysia and suffice if we merely refer to a chosen few to clarify this defence without the need for comprehensive judicial activism. The Court of Appeal in *Venkatesan Chinnasami v Public Prosecutor* [2011] 1 LNS 1736 put it aptly in the following terms:

> ... A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or a box, as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.

[10] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence. A hypothetical scenario could be when an accused person receives a package which contains illicit drugs from say, England when not a shred of evidence could establish him having been aware of the circumstances of the drugs being sent to him or having any nexus to him. Prior to the parcel appearing at his door step he would not have had any reason for suspicion or the opportunity to inspect the parcel bearing in mind that the package was beyond his reach until it reached his hands. The rider is that everything depends on the facts.

[11] Let us now peruse briefly at the relevant parts of the evidence regarding the current case where every opportunity was made available to the appellant to inspect the bag. It was noticeable that there was no suggestion by the defence that the appellant had enquired from the person who handed the two boxes to him or such a suggestion was made to any of the prosecution's witnesses of the contents. He was in a position to examine the contents of the bag entrusted by that Faruk before it was checked in but failed to do so. He was clearly guilty of wilful blindness (see *Hoh Bon Tong v Public Prosecutor* [2010] 5 CLJ 240 (CA) and *Public Prosecutor v Amil bin Akmad* [2007] 5 MLJ 561; [2007] 4 CLJ 688 (CA)). In *Hoh Bon Tong v Public Prosecutor* when discussing this defence held that:

> The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438), 'the concept of wilful blindness qualifies the requirement of knowledge'. And His Lordship continued further by saying (at the same page):
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> > As Professor Glanville Williams aptly remarked in his Textbook on *Criminal Law*, at p 125:
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> > ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truth is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know', he is taken to know'.

Continuing at the same page, His Lordship said:

> In *Ubaka v PP* [1995] 1 SLR 267, the principles laid down in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v PP* [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
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> Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance simpliciter is not enough.

[12] In order not to throttle the discretion of judges, let alone no cases are similar, we are loath to lay down restrictive guidelines for courts to consider prior to deciding whether the defence of innocent carrier can prevail. We leave it to the better judgment of the presiding judge. In the case of *Marlan Marpaung v Public Prosecutor* [2013] 1 MLJ 108; [2012] 8 CLJ 41 the court had occasion to say:

> The defence of the appellant cannot stand in isolation. It must be determined by reference to the facts and circumstances prevailing in each particular case (*Ridwan v PP* [2010] 4 CLJ 570; *Hoh Bon Tong v PP* [2010] 5 CLJ 240; and *Wong Vui Chin v PP* [2011] 3 CLJ 383). In our judgment, the appellant could not avail himself of the defence of innocent carrier because there was ample evidence to show that the appellant had knowledge of the drugs that he was carrying. The contemporaneous conduct of the appellant by fleeing the scene and putting up a struggle with the police party before the discovery of the drugs would have a direct bearing on the facts in issue and would have certainly damaged or whittled away the presumption of innocence on the part of the appellant. A reasonable tribunal appraised of the facts and after hearing this appeal would have concluded that the appellant was not an innocent carrier and that the appellant knew that he was carrying the drugs in the black plastic bag (exh 'P24') for the purpose of trafficking.

[21] After perusing the grounds of the learned trial judge and the appeal records, we agreed with the complaint by the learned deputy that the learned trial judge had erred when His Lordship concluded that the respondent had successfully proven the defence of an innocent carrier. We observed that the learned trial judge had contradicted himself on the issue of transparency of the eight packages. Pages 188–189 AR Vol 2, revealed the following facts:

Mahkamah: Ingin mengesahkan daripada kedua-dua pihak samada bungkusan-bungkusan itu boleh dilihat kandungannya daripada luar.

TPR: Boleh nampak sebahagiannya kerana telus sebahagiannya.

PB: Sahkan.

Mahkamah: Sendiri melihat dan sahkan perkara ini tapi tidak boleh dilihat keseluruhan kandungan 8 bungkusan plastik itu disebabkan terdapat plastik berwarna dan yang telus hanya sebahagian sahaja (the contents can only be partially seen from its outside).

[22] In his grounds, the learned trial judge made a finding that the packages were not transparent at all. At p 22 of the additional appeal record (1), His Lordship stated:

> 43. However, as a matter of common sense, this Court examined the photos [P10(6-7)] and inspected the 8 packages where it was abundantly clear that the packages were not transparent for the contents to be visible. The Court found that the Learned Deputy Public Prosecutor had misled this Court in submitting that the packages were half coloured and half transparent. After inspecting the packages, this Court found that the defence of innocent carrier becomes probable in the circumstances of this case and could be distinguished from facts in the cases of *Paul Anayo Madubugwu* and *Hoh Bon Tong* (supra).

[23] Based on the factual matrix of the instant appeal, the respondent should have every reason to suspect when given the eight packages of macaroni where four of them were of different weight but he did not examine them even when he had the chance and opportunity to do so. The respondent had himself to be blamed for his folly for not examining the eight packages. Surely the respondent should have suspected when Ejike told him the packages contained macaroni to be given to his brother, Udo as Udo likes macaroni very much when in fact macaroni are widely available in Malaysian market.

[24] In the case cited by the learned trial judge, *Paul Anayo Madubugwu v Public Prosecutor* [2015] MLJU 2143; [2015] 1 LNS 431 where the facts had some semblance with the instant appeal, Rohana Yusuf JCA in dismissing the appellant's appeal, said:

> [16] The learned judge had also given due consideration to the defence of innocent carrier premised on his defence of lack of knowledge. In her judgment the judge found that the appellant should have every reason to suspect when given the three heavy cylinders to be carried. Yet, having the chance and opportunity to examine, he did not to do so. Instead he choose to turn a blind eye which the learned judge rightly found to be his own folly. The appellant's wilful blindness would not support a defence of innocent carrier as decided by this court in *Hoh Bon Tong v PP* [2010] 5 CLJ 240.

[25] We did not agree with the learned trial judge's reasoning when His Lordship ruled that it was unfair to equate the respondent with PW4 because PW4 was a well-trained and experienced enforcement officer with the necessary skills whilst the respondent was just a layman to tell the difference in the packages which contained the impugned drugs. To us, it did not require any skill or training to know the difference in the weight of the eight packages whereby suspicions can be raised. By merely lifting the packages one will know the differences and suspicions aroused. The learned trial judge erred in relying only on the appearance and transparency of the packages to negate inference of knowledge on the part of the respondent in the instant appeal before us.

[26] We held that the defence of innocent carrier cannot be believed and has not cast any reasonable doubt on the prosecution's case just because the packages were not transparent. In his own evidence, the respondent admitted that he did not check what were the contents of the packages as he trusted what was informed by Ejike that the contents of the packages were macaroni.

[27] In *Baharudeen Mohamed Yusoff Ghaney v Public Prosecutor* [2013] 2 MLJ 425 it was decided:

> [19] Again we are in complete agreement with the trial judge that the conduct of the accused displayed nothing short of wilful blindness towards the contents of the 31 tins inside P7. He also correctly relied on the Singapore Court of Appeal case *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, although there are our own reported cases on the same issue. It was held in that case:
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> > It is thus not enough for an accused merely to assert absence of knowledge. The facts of the case must be examined as a whole to see whether he had good reason to suspect that he was carrying drugs ... In short, ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination; ignorance simpliciter is not enough.

[28] On the second ground of appeal, we again agreed with the learned deputy that the learned trial judge erred in his finding that the respondent's testimony in court was consistent with his cautioned statement. At p 25 of the additional record of appeal (1), the learned trial judge said:

> 50. This Court also noted that the Accused's testimony in the Court is consistent with his cautioned statement (D68) which had strengthened his defence's case to invite this Court to believe in the Accused's story.

[29] We agreed with the learned deputy's submission that the learned trial judge had failed to adequately consider the following:

(a) the defence of the respondent was that the reason he came to Malaysia was for the purpose to buy motorcycle spare parts. But when asked as to where and which part specifically in Malaysia the cheap spare parts can be found and where he intended to buy them, he only answered 'I don't know where to buy them'. Even though he did say that Ejike had informed him about his brother who is studying in Malaysia and will assist with the buying of spare parts, it is very illogical for a person to go to a foreign place without knowing exactly where in that country that such cheap spare parts could be found. Much more, there was not even a mention of any specific state like Kuala Lumpur or Selangor or Negeri Sembilan with regards to where such objects of desire could be found at such allegedly cheap prices as compared to other countries;

(b) the learned trial judge relied on membership card issued by Fairly Used & New Motorcycle Dealers Association ('FUNMDA') marked as

exh P54 to come to a conclusion that it is consistent with the cautioned statement in D68. P54 was not conclusive evidence that the respondent was a person who dealt with in trading of spare parts and the reason he came to Malaysia was for that sole purpose. Unless there was a confirmation (which could be by way of oral or written evidence) from a representative of FUNMDA that the respondent is actually a member of the Association; exh P54 holds no evidentiary value in confirming the respondent's membership with the said Association. Further, it was in the testimony of the respondent that Ejike was also a member of the same Association. However, effort was done to get confirmation through Ejike himself that he was actually a member of the Association to which such confirmation could assist the respondent's defence in lending it a great credence;

(c) the learned trial judge had clearly misdirected himself when he made a finding that 'it is not a disputed fact that Kuala Lumpur, Malaysia is a hub for motorcycle spareparts'. There was no evidence at all that Kuala Lumpur, Malaysia, is a hub for motorcycle spare parts. The said finding could only had been picked from thin air and not based upon any evidence available throughout the trial at the court below. Furthermore, it was never mentioned by the respondent that he was going to Kuala Lumpur. What was mentioned throughout his oral evidence and cautioned statement only referred to 'Malaysia' and not specifically to any state in Malaysia. The learned trial judge had therefore embarked on a wrong finding as to relevant facts of the case. Such a finding by the learned trial judge does not fall within the scope of s 57 of the Evidence Act 1950 or any of the paras (a)–(o) with regards of 'facts of which court must take judicial notice' and need not be proved;

(d) it is illogical that the respondent would travel all the way from Nigeria to Malaysia by originally bringing only a very small bag (P36) and a plastic bag (which he said he threw it away after he put his clothes inside the bag which contained the impugned drugs, (P40)) when he had planned to stay in Malaysia for one week;

(e) the respondent in his evidence stated that he took out his clothes from a plastic bag (which was later thrown away) and put them inside the bag which contained the drugs (P40) because he found there were still empty spaces inside the bag. It clearly contradicted his evidence in defence that the bag was supposed to be handed over to Ejike's brother. As the bag was supposed to be handed over to somebody else, why would his clothes be inside the bag; and

(f) it is strange that the respondent could not provide any details with regards to Ejike's brother who was supposed to meet him at the airport. There was no evidence adduced that the respondent had ever met Ejike's brother nor did he know how Ejike's brother looks like as no description

about that person was ever given to the investigation officer or in his oral testimony during the case for the defence.

[30] We also agreed with the learned deputy's submission that the defence put forward by the respondent was one of fabrication and had failed to successfully raise the defence of innocent carrier. Through the cross-examination of the respondent, material contradictions between the respondent's oral testimony and his cautioned statement (D68) appeared as follows:

(a) in D68, the respondent mentioned that there were packets of macaroni and other type of food inside the bag which was given to him by Ejike. In his oral testimony, however he mentioned that there was only macaroni and no mention of other type of food found inside the bag which was given to him by Ejike;

(b) in D68, the respondent did not at any time mention the name Udo Chukwa as being the brother of Ejike. The name Udo Chukwa also was never put or suggested to PW6 (the investigating officer). It was only in his oral testimony at the defence stage and when cross-examined by the learned DPP that the name Udo Chukwa popped up. Even during examination-in-chief, the name Udo Chukwa was never mentioned. It is also interesting to note that during cross-examination as well, the respondent admitted that he was not very sure as to whether the person he was supposed to meet at the airport was 'younger or elder brother' of Ejike;

(c) in D68, it was never mentioned that Ejike's brother would be the one who will take him around to shop for motorcycle spare parts in Malaysia. It was also never mentioned that Ejike's brother was also involved or dealing with motorcycle spare parts in Malaysia. It was only through his oral testimony during the defence stage that he mentioned since he did not know where to buy the spare parts in Malaysia, Ejike informed him that his brother who was studying in Malaysia would assist him with that as the brother also was involved in the motorcycle spare parts business. This also was never put or suggested to any of the prosecution's witnesses during the prosecution's case especially to PW6 being the investigation officer of the case; and

(d) it was never ever mentioned in D68 that Ejike's brother had contacted him through his handphone when he arrived at the KLIA on the day of the arrest. Much more, it was never ever put or suggested to any witnesses for the prosecution especially to SP6 as the investigating officer that Ejike's brother had called him on his handphone upon his arrival at the KLIA. It was only when giving evidence for the defence that the respondent mentioned that 'somebody called me and said he is the brother of Ejike and he said he was at the airport waiting for me'. This

piece of defence evidence is an afterthought as it was never ever raised at any stage of the prosecution's case or the cautioned statement, D68.

[31] We observed that the cautioned statement (D68) was recorded on 25 September 2013 which was only two days after the arrest and where the recollection of events would have been still intact as the facts were still fresh in the mind of the respondent. Despite that, there were too many material and important information as well as facts which were stated in the respondent's oral testimony in court but were not in D68 which rendered the differences as material contradictions. The name Udo and that there was a call to respondent's handphone by somebody who claimed to be Ejike's brother, were afterthought defence. These had never ever been raised in the prosecution's case or in the cautioned statement (D68) of the respondent.

[32] We found that the learned trial judge's finding that the respondent's oral testimony was consistent with his cautioned statement was based on the wrong appreciation of the evidence.

CONCLUSION

[33] On the above premises, we allowed the appeal and accordingly the order of an acquittal by the High Court was set aside. We substituted with an order of conviction of the respondent under the original charge. We imposed the mandatory death sentence on the respondent under s 39B(2) of the Act.

Appeal allowed; order of High Court set aside; accused convicted under original charge and sentenced to death.

Reported by Dzulqarnain Ab Fatar